DOCKET NO. 1200802

IN THE SUPREME COURT OF ALABAMA

STANLEY LOCHRIDGE, M.D. and CARDIO-THORACIC SURGEONS, P.C.,

Appellants/Defendants

v.

FRANCES ANN TOMBRELLA, Individually, and FRANCES ANN TOMBRELLA, In her Capacity as Special Administratrix of the Estate of RONALD SANTO TOMBRELLA,

Appellee/Plaintiff.

On Appeal from the Circuit Court of Jefferson County, Alabama
Case No.: CV-2019-903763

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Michael K. Wright (WRI005)
Sybil V. Newton (ABB001)
George E. Newton, II (NEW049)
STARNES DAVIS FLORIE LLP
100 Brookwood Place – 7th Floor
Birmingham, AL 35209
Phone: (205) 868-6041
mwright@starneslaw.com
snewton@starneslaw.com
gnewton@starneslaw.com
Attorneys for Appellants, Stanley Lochridge, M.D. and Cardio-Thoracic Surgeons, P.C.

STATEMENT REGARDING ORAL ARGUMENT

The Appellants/Defendants, Dr. Stanley Lochridge and Cardio-Thoracic Surgeons, P.C., respectfully request oral argument. The underlying facts and chronology of events relating to the 305 day/10-month delay in service of these Defendants are straight-forward and not in dispute. However, the legal question of how the provisions of ARCP 4(b) should be applied here is more complicated and implicates important policy considerations which have not yet been directly addressed by this Court. The circumstances presented in this case are extreme. The lengthy delay was due to admitted inaction beyond one attempt at service when the case was originally filed. To hold, as the Plaintiff urges, that a trial court has unbridled discretion to extend the 120-day time limit almost three times over without any stated basis for such a ruling would be equally extreme – especially given that there was ample opportunity for two different attorneys to request an extension but no such request was ever made coupled with current counsel's admission the delay both before and after he entered an appearance was not due to mistake or misinformation but rather inaction and "inadvertence." Such a holding would leave Rule 4(b)'s

timing provisions nothing more than a loose guideline (rather than a Rule) that could be disregarded for any reason, or no reason, rendering the stated 120-day limit as a meaningless number without any real limitation whatsoever – a result which would be inconsistent with both the letter and the spirit of both ARCP 4(b) and FRCP 4(m).

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to the provisions of ARAP 5. The case is within the original appellate jurisdiction of this Court, and this Court's Order of November 24, 2021 granted permission to these Defendants to file an appeal based upon the trial court's August 11, 2021 Order certifying the question presented for interlocutory appeal. (C. 884-887)

TABLE OF AUTHORITIES

Page

Rules

STATEMENT OF THE CASE/PERTINENT FACTS[1]

The Plaintiff filed her Complaint through prior counsel (asserting claims of medical malpractice/wrongful death related to the decedent's death on August 25, 2017) on August 22, 2019 naming several Defendants: Dr. Stanley Lochridge, Cardio-Thoracic Surgeons, PC, St. Vincent's Birmingham, Nurse Walter Meherg, Nurse Laura Wagner, and Nurse Jordan Bertram. (C. 29-46) The Plaintiff perfected service on the three nurses and St. Vincent's Birmingham by certified mail, and the case currently pending against those Defendants is not at issue in this appeal. (C. 53-58, 61-62)

Service on Cardio-Thoracic Surgeons, P.C. was likewise attempted by certified mail (addressed to Dr. Randleman, an agent for and member of the P.C.) at an old address at a Baptist-Montclair Professional Office Building in use before Baptist-Montclair moved locations. (C. 59) That certified mail card was returned a few weeks later - on September 6, 2019 - stamped "Return to Sender, No Such

[1] These Defendants have combined their Statement of the Case and Statement of Facts into one section since the pivotal question of the sufficiency of service under Rule 4(b) is primarily a procedural one which is intertwined with the facts pertinent to service such that it best lends itself to a single, chronological section.

Number, Unable to Forward." (C. 60) Despite this notification, no further attempts to correct the address or serve the P.C. were made by prior counsel.

Service on Dr. Lochridge was also attempted once, not by mail, but rather by process server at his office address on October 8, 2019 -- over 7 weeks (50 days) after the Complaint was filed. (C. 183) The "Return on Service" section of the Summons was signed and returned on October 9, 2019 marked "Returned not served on 10/8/2019" noting the deputy was "Unable to make contact" with Dr. Lochridge on that occasion. (C. 183) Other available boxes on the Return of Service section of the Summons ("Moved/not at address," "Insufficient address," or "Not employed at address") were not checked – only the box indicating "Unable to make contact" on that date was checked. (*Id.*) Again, despite this notification, there were no further attempts to serve Dr. Lochridge after that one attempt and absolutely no reasons given for this failure to follow up. (See Plaintiff's Opposition to Rule 5 Petition filed with this Court, p. 3)("As a practical matter [prior legal counsel] took no further action in attempting to have these Defendants served after the initial service returns were made to the Court.")

Counsel for the Plaintiff filed a Motion to Withdraw over a month later (C. 243), which was granted the next day, on November 15, 2019. (C. 245) As referenced above, it is undisputed and a matter of record that prior counsel made only a single attempt to serve each of these Defendants after the case was filed in 2019. No explanation was ever given for the failure to follow up on service of these Defendants by prior counsel. Plaintiff has conceded that prior counsel "did not make any further attempts to have [either of these] Defendants served before she was allowed to withdraw on November 15, 2019." (C. 570)

After Plaintiff's prior counsel was allowed to withdraw, the Plaintiff was given thirty days to retain new counsel since a non-attorney acting *pro se* cannot represent the interest of an estate in a wrongful death action. (C. 262-263) Plaintiff retained new counsel within that time frame, who entered an appearance on February 8, 2020. (C. 266-267) There is no dispute that, as of the date of the appearance of current counsel on February 8, 2020, more than 120 days

(*i.e.*, 170 days) had already passed from the date of the filing of the Complaint in August of 2019.[2]

Importantly, the record demonstrates current Plaintiff's counsel was aware of the timing and prior failure of service when he entered the case but nonetheless didn't attempt to serve either of these Defendants until after more than another 120 days had passed. In Plaintiff's Opposition to these Defendants' Rule 5 Petition filed with this Court on September 15, 2021, Plaintiff's counsel asserts: (1) the trial court set and held a status conference on February 28, 2020 (C. 264) which he attended, (2) that he did not make any "formal written request for an extension," but (3) that he discussed with the trial court the fact that he knew these Defendants had never been properly served and gave the

---

[2] Plaintiff's Opposition to Defendants' Rule 5 Petition filed with this Court seems to suggest this Court should not consider the full amount of time of this delay in service (of 10 months/305 days) because the Plaintiff was representing herself during some of that time. (Opposition to Rule 5 Petition, p. 8-9) There is no law cited to support this suggestion that a change of counsel and resulting gap in representation tolls the time allotted for service, as none exists. Furthermore, *even* if there were a basis in Alabama law for such a tolling (which there is not), these Defendants were not served until June 22, 2020, well beyond 120 days even if the *pro se* time period could be subtracted from the count *and* they were served beyond the 120 days allowed by Rule 4(b) *even if the time were started over when new counsel entered an appearance on February 8, 2020.*

trial court the impression that if she would delay entering a scheduling order he would cure the problem. (Opposition to Rule 5 Petition, filed with this Court 9/15/21, p. 4, 9) ("The court held a status review and scheduling conference on February 28, 2020 and was notified by Plaintiff's counsel that the summons to Defendants had been returned not served and requested the court delay entering a scheduling order until service could be obtained on the outstanding defendants....[A] formal written request for an extension was not made in writing to the Court.")[3]

The Plaintiff's suggestion to this Court, made for the first time in connection with the Rule 5 Petition, that because the trial court "did not take any action toward a dismissal at the time [of the February 28th

[3] There is no transcript of the February 28, 2020 status conference. Likewise, there was no filing made at any time at the trial court level which suggests there was some implied extension of time following the February 28th status conference. These Defendants were not parties to the case at that point. It would be improper to ask this Court to assume or base a ruling on an argument *made for the first time on appeal* describing a discussion *which is not part of the record*. The only relevance that can properly be assigned to Plaintiff's argument to this Court regarding the February 28th status conference is that it demonstrates the Plaintiff is not contesting what the record already indicates – *i.e.*, that there was no mistaken assumption or lack of knowledge on the part of Plaintiff's current counsel about the prior failure of service or the timing thereof, and that there was no request made to or granted by the trial court extending the 120 days.

status conference]," this Court should somehow view that as an open-ended, informal extension is due to be rejected. Not only is there nothing in the record to suggest the trial court understood the Plaintiff to be seeking an extension or intended to informally grant one, the trial court's Order certifying this matter for a Rule 5 appeal states just the opposite, specifying "there was no requested extension of time to perfect service **by Plaintiff's prior or present counsel**...[and] service was not attempted again or perfected until June 22, 2020 – an additional 19 weeks/135 days from current counsel's entry of appearance in the case." (*See* Order at C. 884-885; also attached hereto as **Ex. A** for the Court's ease of reference) Furthermore, nothing the Plaintiff filed with the trial court suggested that there was an informal extension. In fact, when Plaintiff's counsel filed a Proposed Order with the trial court related to Defendants' Motion to Dismiss, there was no mention therein of the February 28th status conference or any inference during that hearing of an extension of time. To the contrary, the Plaintiff's submitted Proposed Order specifically states: "Once Plaintiff's current counsel filed his notice of appearance on February 8, 2020, he began responding to long overdue discovery due to the other defendants....and inadvertently did

not request any extension of time from this Court to serve movants." (C. 582)

Thus, the record clearly establishes Plaintiff's counsel was aware of the lack of service well beyond the 120 day time limit when he got in the case, did not seek an extension from the trial court, did not begin the process of attempting to re-serve these Defendants until after more than an additional 120 days had passed, and later admitted to the trial court that the failure to do so was nothing more and nothing less than inadvertence. There is simply no legal or factual basis upon which to assume the 120 days had been tolled or started over when new counsel entered an appearance. There was no further attempt to serve either of these Defendants until June 16, 2020 – a date which is over 120 days (129 days) after present counsel entered an appearance in the case – and service was not perfected until June 22, 2020 (135 days after his entry into the case). (C. 516, 517) [4]

[4] These Defendants set out this chronology to clarify what is a matter of record in this case given what seems to be a recent effort on the part of the Plaintiff to suggest there may have been an informal extension or some showing of good cause for the delay at the trial court level. As the trial court recognized in its Order certifying this interlocutory appeal, there was not. (C. 884-887/Ex. A)

Plaintiff's recent filing with this Court also contains a vague generalized reference to "the Covid-19 pandemic" in what seems to be another attempt to suggest there was good cause for the delay he previously admitted was due to inadvertence. In fact, there was never *any* evidence presented to the trial court (through an affidavit of counsel or otherwise) demonstrating any specific way in which the COVID-19 pandemic prevented Plaintiff's counsel from re-attempting service by certified mail on these Defendants at any time from the moment he entered the case in February of 2020 up until the time service was perfected on June 22, 2020. Indeed, it was still in the middle of the throes of the pandemic that counsel filed two new Summons for both of these Defendants on June 16, 2020 which were promptly served by certified mail at the Defendants' correct and publicly-available addresses on June 22, 2020. (C. 516, 517, 550, 559) There is simply no basis upon which the trial court, or this Court, could conclude that the pandemic's limitations on in-person court appearances caused a delay in serving these Defendants outside of the 120 days permitted by Rule 4(b) or that there was a showing of good cause for the delay at the trial court level related to the pandemic.

There was likewise no evidence presented to the trial court of any problems finding addresses for these Defendants or documenting any efforts at all by the Plaintiff to serve these Defendants following the February 28th status conference. Rather, it is undisputed that more than *another* 120 days had expired before the next attempt at service on June 16, 2020 with service resulting within six (6) days, after 10 months (and over 300 days) had run from the filing of the Complaint.

During those 10 months, the case had been proceeding against St. Vincent's and the nursing Defendants. (C. 2-21) Though the case has now been stayed pending this appeal, it was previously set for several status conferences and set for trial twice following the parties' exchange of discovery responses and subpoena of numerous medical records by both sides. (*Id.*)

After these Defendants were served in June of 2020, they immediately filed a Motion to Dismiss raising the failure to perfect service in compliance with ARCP 4(b). (C. 540-548) The Plaintiff filed a Response which said nothing about COVID-19 or any presumption of an informal understanding with the trial court at the status conference and which made absolutely no mention of the term "good cause" in

relation to the delay. (C. 566-573) No evidence was offered establishing proof any difficulty related to perfecting service earlier. At that point, it was a matter of record that Plaintiff's current counsel, by the time he appeared in the case, had in his possession the correct office address for Dr. Lochridge, knew that the address for the P.C.'s registered agent used previously was incorrect, yet Plaintiff's response failed to offer any explanation of why Plaintiff did not attempt service again on either Defendant for more than *another* 120 days *or* why it would take an additional four months to find the correct address for the P.C.'s agent *or* why there was no request for an extension under Rule 4(b). (*Id.*)[5]

Instead, the Plaintiff's response to the Motion to Dismiss simply stated: "Plaintiff's [prior] counsel did not make any further attempts to have defendants served before she was allowed to withdraw on November 15, 2019. Further, the Secretary of State's records indicated as late as May 2020 that said defendant Cardio-Thoracic's registered agent's address had not changed." (C. 570) No affidavit or admissible evidence of any kind was submitted to establish what the Secretary of

[5] Under the circumstances, these Defendants do not concede an extension would have been proper. Nevertheless, there was no request for extension during the 120 day limit established by Rule 4(b) nor at any time thereafter.

State's records showed in May of 2020 regarding the name or address of Cardio-Thoracic's service agent or explaining why Dr. Randleman's publicly available office address in Homewood, AL (where service was ultimately made without a problem) was not found for 10 months. No explanation whatsoever was given regarding the delay in serving Dr. Lochridge, whose address has nothing to do with the Secretary of State's records. Further, as mentioned above, the Plaintiff also submitted a Proposed Order (which was later substituted with a "Corrected" Proposed Order) attributing the delay in service to Plaintiff's counsel's efforts to "respond to long overdue discovery" which caused him to "inadvertently" fail to request an extension of time from the court to serve these Defendants. (C. 582) Thus, the only response from the Plaintiff before the trial court ruled on this issue was an admission of "inadvertence" without any submission of admissible evidence to demonstrate good cause.

The trial court held a hearing on these Defendants' Motion to Dismiss on July 23, 2020. (C. 555) As evidence by the trial court's Order certifying this issue for interlocutory appeal, no further explanation for the delay in service was offered by Plaintiff's counsel at the hearing and

no evidence was submitted, nor was there any showing of good cause. (*See* Order, C. 885-886, also attached as **Ex. A**) ("Plaintiff's current counsel's response to this Court was that the initial attempts at service by prior counsel failed due to unavailability and notice of a 'wrong address.'")

A year following the hearing, on July 21, 2021, the trial court entered a one-sentence Order denying these Defendants' Motion to Dismiss. (C. 841) The Order gives no explanation for the denial. It does not reference any finding of good cause, nor does it offer any support for basis or an exercise of discretion to extend the 120 days almost three-fold absent a showing of good cause. (*Id.*)

These Defendants filed an Answer asserting that the trial court lacked jurisdiction over them. (C. 851) They also filed a Motion to Reconsider or, Alternatively, to Certify Question for Interlocutory Appeal. (C. 871-876) On August 11, 2021, the trial court entered an Order granting these Defendants' Motion to Certify Question for Interlocutory Appeal, specifying the Order was entered within 28 days of the July 21, 2021 Order and therefore within time frame provided for in ARAP 5. (C. 884-887; also attached as **Ex. A**) The trial court's August

11, 2021 Order clarified the undisputed facts before the court and certified the following controlling question of law for interlocutory appeal:

> **<u>Question</u>: Does this Court have jurisdiction over Defendants Stanley Lockridge, MD and Cardio-Thoracic Surgeons, PC, both of whom were not served for ten months after the filing of the Complaint (August 22, 2019 filing/June 22, 2020 service), considering the 120-day service/showing of good cause requirements of ARCP 4(b) and in light of the undisputed facts that: (1) service on both Defendants was attempted at the outset of the case with no follow up or subsequent attempts at service until June of 2020; (2) there was no requested extension of time to perfect service by Plaintiff's prior or present counsel; (3) current counsel for the Plaintiff appeared on February 8, 2020 but service was not attempted again or perfected until June 22, 2020 – an additional 19 weeks/135 days from current counsel's entry of appearance in the case; and (4) in response to these Defendants' Motion to Dismiss, Plaintiff's current counsel's response to this Court was that the initial attempts at service by prior counsel failed due to unavailability and notice of a "wrong address." (Doc. 168)**

(C. 884-887/**Ex. A**) These Defendants timely filing a Petition for Permission to Appeal with this Court within 14 days of the trial court's August 11, 2021 Order, which was granted on November 24, 2021.

STATEMENT OF THE ISSUES

I. Whether the wording of ARCP 4(b) and this Court's rulings thus far contemplate a showing of good cause to justify an extension of time for service.

II. Whether, even if this case is analyzed under federal law interpreting FRCP 4(m), the most reasoned federal opinions point towards limits on trial courts' discretion to avoid rendering the rule meaningless.

STATEMENT OF THE STANDARD OF REVIEW

These Defendants' Motion to Dismiss this case was based upon the Plaintiff's failure to serve the Defendants in compliance with ARCP 4(b) and a resulting lack of jurisdiction over these Defendants. (C. 540, 871) Review of the denial of a motion to dismiss based on an asserted lack of jurisdiction (subject matter and/or personal)[6] is reviewed *de novo* with no presumption of correctness. *Facebook, Inc. v. K.G.S.,* 294 So. 3d 122, 130 (Ala. 2019), citing *Ex parte Lagrone*, 839 So. 2d 620, 623 (Ala. 2002); *Ex parte Bullard*, 133 So. 3d 900, 902 (Ala. Civ. App. 2013), citing *Nance v. Matthews,* 622 So. 2d 297, 299 (Ala. 1993).

---

[6] The failure to properly perfect service in accordance with the provisions of Rule 4 is tantamount to a failure to obtain personal jurisdiction. *Slocumb Law Firm, LLC v. Greenberger*, 2020 WL 4251659 (Ala. July 24, 2020) ("The failure to effect proper service under Rule 4, Ala. R. Civ. P., deprives the trial court of personal jurisdiction over the defendant and renders [its] judgments void.... 'When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally.'... 'Strict compliance regarding service of process is required.'"); *See also, Campbell v. Taylor*, 159 So. 3d 4, 10-11 (Ala. 2014); *Image Auto, Inc. v. Mike Kelley Enterprises, Inc.,* 823 So. 2d 655, 657 (Ala. 2001) ("It is settled law that failure to effect proper service under Rule 4, Ala. R. Civ. P., deprives the court of jurisdiction and renders a [subsequent] judgment void.")

SUMMARY OF THE ARGUMENT

This Court has not heretofore directly addressed the issue of the necessity of a showing of good cause in order for Rule 4(b)'s 120-day time limit to be extended or whether its discretion includes discretion to extend the 120 days even when there has been no showing of good cause and no request for an extension of the limitations period. Here, the trial court's Order certifying this interlocutory appeal acknowledges, and the record bears out, that there was no showing of good cause. Though the trial court ultimately denied these Defendants' Motion to Dismiss, it did not give any reason for doing so and obviously had doubts regarding its ruling since it certified the issue for interlocutory appeal in an Order referencing the good cause language of Rule 4(b), the minimal explanation given by the Plaintiff to explain the lengthy delay, and the lack of efforts to serve the defendants in a timely fashion or seek an extension from the trial court. (C. 884-887/**Ex. A**)

This case brings to light an important issue: not whether a trial court has any discretion under Rule 4(b) but whether discretion should be unbridled in a situation such as this one. If Rule 4(b)'s stated 120-day time limit is to have any meaning, it cannot and should not be

deemed *completely* optional and subject to being disregarded or excused by a trial court without any stated reason or support for the exercise of discretion by the trial court after a total lapsed time of 10-months, without *any* meaningful showing of cause ("good" cause or otherwise). While the Plaintiff has argued "inadvertence," this argument was contradicted by other statements in the Plaintiff's filings admitting knowledge of the 120-day time-limit and its expiration. If Rule 4(b)'s time limitation can be known but disregarded and then excused by trial courts without any requirement of a stated reason, despite (1) an almost one-year delay, (2) no evidence of good cause for the delay, (3) not even a plausible explanation for such a significant delay, (4) no evidence of avoidance of service by the defendant(s), (5) no request for an extension of time by two different attorneys despite numerous opportunities to do so, then that would be tantamount to unbridled discretion and a holding that the application of Rule 4(b) is completely optional. The Rule and its stated 120-day time limit would be pointless if deemed wholly discretionary and subject to waiver by a trial court long after the fact without any showing of good cause and no matter how long the delay.

ARGUMENT

I. THE WORDING OF ARCP 4(B) AND THIS COURT'S RULINGS THUS FAR CONTEMPLATE A SHOWING OF GOOD CAUSE TO JUSTIFY AN EXTENSION OF TIME FOR SERVICE.

Rule 4, ALA. R. CIV. P., was amended effective August 1, 2004 to read as follows:

> **(b) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint,** the court, upon motion or on its own initiative, after at least fourteen (14) days' notice to the plaintiff, may dismiss the action without prejudice as to the defendant upon whom service was not made or direct that service be effected within a specified time; **provided, however, that if the plaintiff shows good cause for the failure to serve the defendant, the court shall extend the time for service for an appropriate period.**

(emphasis added) According to the 2004 Committee Comments, "Subdivision (b)...is borrowed from FED. R. CIV. P. 4(m)...except for the provisions for 14 days' notice [to the plaintiff prior to any dismissal]." FED. R. CIV. P. 4(m) has several differences from Alabama's Rule 4(b) and reads as follows:

> (m) **Time Limit for Service**. If a defendant is not served within 90 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Comparing the two, ARCP 4(b) uses the term "may dismiss" instead of "must dismiss," adds a semicolon to connect the two parts of the rule, and as stated in the committee comments, adds a requirement that a plaintiff be given 14 days' notice before any dismissal order.

The Plaintiff's position thus far has been that the 120 days is not a strict requirement or a "hard and fast rule," and can be retroactively waived by the trial court at any time, for any reason or basically no reason except that the time limit was not met without any showing of good cause. (See e.g., C. 582-584) However, the handful of cases issued by Alabama courts since 2004 interpreting Rule 4(b) in other situations support a finding that a trial court's discretion in such an extreme situation is not boundless and does not allow service beyond 120 days with no previous request for or extension by the trial court of the time for service and absolutely no showing of good cause for that delay.

While Alabama courts analyzing Rule 4(b) since 2004 have referenced the relationship to its federal counterpart and have instructed the wording of Rule 4(b) is to be given its plain meaning, they have also provided context for the Rule's wording and the insertion in Alabama of the 14-day notice requirement, and have linked a trial

court's prerogative to dismiss a case with an expectation of a showing of "good cause" within those 14 days in order to avoid dismissal. For example, in *Moffett v. Stevenson*, 909 So. 2d 824 (Ala. Civ. App. 2005) – the first Alabama case construing ARCP 4(b) following the 2004 amendment – this Court specifically instructed "the **obvious purpose** of the [14 day] notice requirement [prior to a trial court's dismissal of an action for lack of timely service] is **to give the plaintiff an opportunity to show 'good cause' to extend the time for service.**" *Id.* at 826-827. (Emphasis added). The two phrases contained in Rule 4(b) and separated by a semicolon -- one phrase which discusses the trial court's discretion to dismiss a case only after giving notice to a plaintiff and the second phrase which contains an instruction to trial courts that they shall extend the time for service for "an appropriate period" **if** the plaintiff shows good cause for the failure to timely serve the defendant -- have been specifically held to be interrelated and intended to be interpreted and applied together as opposed to separately in a vacuum. In other words, given this Court's explanation that the reason ARCP 4(b) provides 14-days' notice to a plaintiff before dismissal was to allow a showing of "good cause" in order to avoid

dismissal, it is logical to conclude that without such a showing, dismissal is merited.

In 2007, this Court affirmed[7] a trial court's dismissal of an action under Rule 4(b) in *Coleman v. Smith*, 987 So. 2d 1126 (Ala. 2007) when there was only one initial attempt to serve the defendant with no follow up attempts and, like here, service occurred approximately one year after the filing of the complaint with emphasis by the trial court that

---

[7] While the trial court's ruling in *Coleman* was affirmed without opinion, the case is referenced here because there was a dissent setting out facts very similar to the case at hand which seem to bear mention as part of the handful of cases in which members of this Court have analyzed the application of Rule 4(b). It should be noted, however, that the conclusion of Justice Cobb's dissent in *Coleman* (that 4(b) did not even apply in the case) is a complete outlier and is based on the flawed statement that "in [her] research with respect to Rule 4(m), [she] discovered no federal case holding a trial court might properly dismiss a claim where service has been accomplished later than 120 days *once service has been perfected*." *Id.* at 1129. This statement in a dissent, which does not cite a single federal case to support its conclusion, is not binding and is not borne out in the numerous federal cases applying Rule 4(m) with no mention of such a limitation and/or analyzing its application after belated service was perfected. *See e.g., Horenkamp v. Van Winkle and Co., Inc.*, 402 F.3d 1129 (11th Cir., 2005) (Case in which service had been perfected 29 days after the 120 day time limit had expired in which the Court held the district court had discretion under the circumstances to extend the time for service but did **not** hold the application of Rule 4(m)'s time limits was foreclosed by the fact service had been perfected.)

the plaintiff offered no real explanation "why no further attempts were made." *Id.* at1128.

Continuing chronologically, the Alabama Court of Civil Appeals issued an opinion in 2009 in *State Farm Fire & Cas. Co. v. Smith,* 39 So. 3d 1172 (Ala. Civ. App. 2009) which also touches on the provisions of Rule 4(b). In that case, the trial court dismissed the case for failure to perfect service but did so *before* the expiration of the full 120 days allowed under Rule 4(b). The Court of Civil Appeals reversed and remanded, holding that "an action may not be dismissed for insufficient service before the expiration of the 120-day period." *Id.* at 1175. While that particular timing issue is not present in the case at hand, the Court's discussion of Rule 4(b) is relevant here. First, the Court generally cited the U.S. Supreme Court case of *Henderson v. U.S.*, 517 U.S. 654 (1996), a case which analyzes the question of whether a showing of good cause is required for a district court to exercise its discretion under FRCP 4(m). While *Smith* does not mention that part of the *Henderson* opinion, its citation to *Henderson* does indicate support for the proposition that the federal cases are relevant when Alabama courts are analyzing the application of ARCP 4(b). Second, the *Smith*

Court emphasized the connection between a showing of good cause to justify an extension of the 120-days, stating, "With the adoption of the current Rule 4(b), if a plaintiff fails to perfect service within 120 days, a trial court may now dismiss an action without prejudice pursuant to that rule. F.N. 2: We note however that Rule 4(b) provides that 'if the plaintiff shows good cause for the failure to serve the defendant, the court shall extend the time for service for an appropriate period.'" Id. at 1176. Neither of the above-cited parts of the *Smith* holding speaks directly to the issue in the case at hand, but both do emphasize a trial court's discretion under ARCP 4(b) and the good cause provision of the Rule.

However, *even* if this Court were to assume trial courts should have some discretion to extend the timing provisions of Rule 4(b) absent a showing of "good cause," it still must deal with the other holdings issued previously in Alabama which demonstrate the 120-day requirement was intended to have real meaning and discretion was never unbridled or to be exercised without explanation or basis. Rule 4(b) has never been held by this Court to be a toothless guideline which can be disregarded by any plaintiff or trial court for any reason at any

time, or even for no reason at all. This was again supported by the language used and logic employed by this Court in *Precise v. Edwards*, 60 So. 3d 228 (Ala. 2010). While *Precise* was ultimately decided on the related but slightly different question of whether the plaintiff had a bona fide intent to have the defendants immediately served, the situation presented and the reasoning of the Court are instructive here.

First, the *Precise* Court affirmed the dismissal of the case based on the plaintiff's failure to effectuate service until 131 days after filing the complaint based, in part, on its emphasis of the "**unexplained** delay" by the plaintiffs and the "**unrebutted**" state of the evidence before the trial court. *Id.* 232, 233. Second, the *Precise* Court emphasized the difference in failure to serve cases in which the plaintiff had done all that he or she was required to do to effectuate service as opposed to cases in which the clerk's office failed to perform some task which was its responsibility. The Court affirmed dismissal of the case finding that the failure leading to untimely service was a failure on the part of the plaintiffs. *Id.* at 233 ("[T]he plaintiffs here were tardy in performing the steps required of them to effectuate service. This unexplained failure to perform tasks required to effectuate service... 'viewed objectively'

evidences a lack of the required intent to have the defendants immediately served.") Thirdly, footnote 4 to the *Precise* opinion, contained in Justice Cobb's dissent, contains the following statement:

> **Absent a showing of good cause** for the delay, **Rule 4(b), Ala. R. Civ. P., requires service on a defendant within 120 days** of the filing of the complaint.

Id. at 236, n. 4. While this footnote is not part of the main opinion, it provides additional context for the demonstrable interpretation by Alabama jurists since the 2004 amendment to Rule 4(b) that there is an interrelatedness between the Rule's 120-day "requirement" and a showing of good cause necessary to justify the trial court's discretion to extend that time limit.

The 2014 case of *Voltz v. Dyess*, 148 So. 3d 425 (Ala. 2014) also supports the principle that the time limit in Rule 4(b) is not viewed by this Court as a matter of complete discretion that can be expanded without limit for any reason or no reason at all. To the contrary, the *Voltz* Court reiterated the reason for the 14-days' notice and specifically instructed that it is not *every* case, or *any* case, but rather only "*in some instances*" that service of process may be allowed beyond 120 days,

specifically linking the notion of extending the 120 days with a showing of good cause:

> We have noted that "Rule 4(b), Ala. R. Civ. P., allows for service of process up to and *in some instances beyond*, 120 days after the plaintiff filed its complaint." ...We agree with the Court of Civil appeals that "the obvious purpose of the notice requirement of Rule 4(b) is to give the plaintiff an opportunity to show 'good cause' to extend the time for service."

Voltz, 148 So. 3d at 427.

Also of note is the 2014 case of *Guthrie v. AL Dept. of Labor*, 160 So. 3d 815 (Ala. Civ. App. 2014), wherein the Court affirmed a trial court's dismissal based on a failure to timely perfect service. The *Guthrie* Court, quoting this Court, specifically noted the insufficiency of plaintiff's statements in an unverified post-judgment motion regarding efforts she claimed to have made to contact the clerk and others, holding those statements *did not* qualify as evidence on the issue of service: "[S]tatements or arguments made in a motion do **not** constitute evidence." *Id.* at 819 (citing *Fountain Fin. Inc. v. Hines*, 788 So. 2d 155, 159 (Ala. 2000)). This tenet of Alabama law confirms that the brief and vague statements and/or arguments made by the Plaintiff here, attempting to blame the 10-month lack of service on a faulty online

address, do not constitute evidence. Without any sworn testimony or admissible evidence to support those statements (which even if supported would have no bearing on the failure to serve Dr. Lochridge), there is no basis upon which any court could conclude there was good cause shown for this lengthy delay. The same is true for the Plaintiff's generalized reference to the COVID-19 pandemic without any showing of how that prevented timely service of these Defendants. To the contrary, as acknowledged by the trial court in its Order certifying this appeal, the only explanation given by Plaintiff's current counsel in response to the Motion to Dismiss "was that the initial attempts at service by prior counsel failed due to unavailability and notice of a wrong address." (C. 884-887/**Ex. A**)

The take-away from all of the above cases can be summarized as follows. ARCP 4(b) sets a specific time limit of 120 days after the filing of the complaint for a plaintiff to perfect service and contains two phrases which Alabama courts have held are to be read together. As demonstrated by the authority cited above, the first provision of the Rule provides if service is not made upon a defendant within 120 days, a court may dismiss the action without prejudice but *only* after giving

14 days' notice to the plaintiff (which this Court has held is intended to provide a 14-day opportunity for the Plaintiff to make a showing of good cause). It logically follows that without *any* such showing, the 120-day time limit should be enforced. Second, the Rule contains a modifying phrase stating "provided, however, that if the plaintiff shows good cause for the failure to serve the defendant, the court shall extend the time for service for an appropriate period." ALA. R. CIV. P. 4(b). In short, it is axiomatic that the Rule requires diligence on the part of the plaintiff's counsel to perfect service. The Rule provides the framework outlining the required diligence: service perfected within 120 days and, failing that, dismissal after 14-days' notice in the absence of a showing of good cause.

Notably, none of the scenarios specifically outlined in these two phrases occurred here exactly as laid out in the Rule, and the events in the case at hand seem to fall in a bit of a crack left by the plain language of the Rule. There was no order dismissing the case after giving the Plaintiff 14 days to show good cause; there was no directive by the trial court that service be effected within a specified time; there was no showing of good cause by the Plaintiff to justify a retroactive

extension of the time limit or explain the 10-month delay. The use of the word "may" in the first phrase obviously contemplates some discretion afforded to trial court's in ruling on a motion to dismiss. However, the phrase cannot and should not be divorced from the second phrase so as to allow unreviewable discretion to trial courts to ignore a lengthy and, in the end, unexplained delay without any good cause or any stated reason for denying a motion to dismiss. Respectfully, these Defendants urge this Court to consider that no Alabama Court thus far has said the 4(b) time limits can be extended for any amount of time with absolutely no showing that even approaches good cause and instead just an admission of "inadvertence" and a concession that other matters such as overdue discovery constituted a distraction. Such an extreme holding would emasculate the Rule's timing requirements all together despite the fact that the authors of the Rule seem to have been seeking to bolster the import of the timing provision with the insertion of a 14-day period to allow for a showing of good cause to justify extending the time.

These Defendants appreciate the trial court's recognition of the ambivalence of the state of Alabama law on this issue and efforts to

have it clarified through this interlocutory appeal. The trial court's one-sentence denial of the Defendants' Motion to Dismiss under the circumstances presented here is not in line with the spirit and letter of Rule 4 or the aforementioned cases construing it and exceeds the discretion the framers of the Rule intended for the trial courts. In fact, the trial court appears to be seeking more definitive parameters given its certification Order acknowledging a substantial basis for disagreement as to its holding. These Defendants urge this Court to clarify the substantial basis for difference of opinion created by the language of Rule 4(b) as compared to the case law and opinions of this Court discussing the meaning and purpose of the Rule. These Defendants also urge this Court to reiterate that, even in the face of some intended discretion, trial courts must show a reasonable basis for significantly extending the 120 days under Rule 4(b) or be instructed that, if there is no such basis, it is an abuse of discretion to disregard the 120-day limit when there was no demonstrable effort made to comply with diligence required by the Rule in a timely fashion or seek an extension of the time under the Rule.

II. EVEN IF THIS CASE IS ANALYZED UNDER FEDERAL LAW INTERPRETING FRCP 4(M), THE MOST REASONED FEDERAL OPINIONS POINT TOWARDS LIMITS ON TRIAL COURTS' DISCRETION TO AVOID RENDERING THE RULE MEANINGLESS.

FRCP 4(m) was enacted in 1993 as a successor to former Rule 4(j), which required that a case "shall be dismissed" if the defendant was not served within 120 days and the Plaintiff did not show good cause why such service was not made within that period. There was disagreement among federal circuits as to whether the new Rule 4(m) changed the mandatory substance of the Rule, with the Fourth Circuit opining that it did not in *Mendez v. Elliott*, 45 F.3d 75, 78 (4th Cir. 1995). Subsequent to *Mendez*, the U.S. Supreme Court decided *Henderson v. U.S.*, 517 U.S. 654 (1996), and in *dicta,* observed Rule 4(m) accords district courts "discretion to enlarge the [service] period even if there is no good cause shown." *Id.* at 662.

After that, several federal courts issued well-reasoned opinions stating that it is unnecessary to resolve definitively whether a finding of good cause remains mandatory under FRCP 4(m), reasoning that "*even if* good cause is no longer an absolute requirement under Rule 4(m), a court would still need to have some reasoned basis to exercise its discretion and excuse untimely service…[to] give some import to the

rule." *Bailey v. Bank of America*, 2017 WL 1301486 (D. Md., April 7, 2017), *citing Hoffman v. Baltimore Police Dpt.*, 379 F. Supp. 2d 778, 786 (D. Md. 2005); *see also, Lehner v. CVS Pharmacy*, 2010 WL 610755 at *3 (D. MD. Feb. 17, 2010)(Observing that even assuming a district court has discretion to excuse untimely filings, courts should not "make a mockery of the time requirements set forth in the Federal Rules of Civil Procedure" when a plaintiff made "no effort" to ensure service occurred within the time allotted by Rule 4(m).)

The Eleventh Circuit has issued similar holdings on the issue. In *Horenkamp v. Van Winkle and Co., Inc.*, 402 F.3d 1129 (11th Cir. 2005), the Court agreed there could, under certain circumstances, be proper discretion exercised by district courts under FRCP 4(m) to extend the time for service even in the absence of a showing of good cause, but nonetheless indicated there would *still* need to be some justification for such an extension when no good cause was shown, such as a defendant who was evading service or if the applicable statute of limitations completely barred the action. *Id.* at1132-1133. Were this Court to apply that logic to the case at hand, it would still support a reversal of the trial court's order given that there was no justification for the denial of

the Defendants' Motion to Dismiss given by the trial court or discernable under the circumstances presented. There is certainly no evidence of an evasion of service by these Defendants, nor would the applicable statute of limitations merit a complete disregard for timely service for almost a year given that it would not bar the Plaintiff's entire action, which will remain pending against several Defendants who were served in a timely manner.[8]

The recent case of *Turner v. Flowers*, 2021 WL 230115 (N.D. Ga., January, 22, 2021), applying the Eleventh Circuit's holdings to the issue of discretion with and without a showing of good cause is instructive. In *Turner,* the Court held:

> Plaintiff has not shown any effort to comply with the requirements of Rule 4..., has made no attempt to justify her inability to comply, and has not requested even once that this Court grant an extension of time to effectuate service, either with or without good cause shown. These

---

[8] Furthermore, the *Horenkamp* Court specifically instructed that "the running of the statute of limitations does not require that a district court extend the time for service of process under the new Rule [4(m)]." *Id.* at 1133. It would make no sense at all, and be overtly unfair, to deem the passing of the statute of limitations to be a free-pass to excuse untimely service in the presence of numerous other factors which demonstrate a lack of diligence despite knowledge of the urgency of the matter. As demonstrated, the Plaintiff was able to serve these Defendants, albeit much belatedly, within six (6) days in June of 2020 during the pandemic.

> circumstances do not warrant the Court exercising its discretion to extend the time to effect service. Without proper service, this Court lacks jurisdiction over Defendant Flowers.

Id. at *5.

Thus, even if this issue is analyzed with weight given to the federal approach to Rule 4(m), this Court cannot disregard that the federal approach still contemplates that when no good cause has been shown for a lengthy delay, trial courts must justify in some discernable and logical fashion the exercise of discretion to extend the time for service. Here, there was no such component to the trial court's order. Give all of the circumstances, including the obvious failure of the Plaintiff to diligently pursue service for almost a year and the failure to ever request an extension of time despite numerous opportunities to do so, the federal analysis still points towards a rejection of discretion exercised without any basis given to support it.[9] If this Court were to

[9] With regard to the Plaintiff's generalized reference to the COVID-19 pandemic, the Defendants ask this Court to reject such a vague and unsubstantiated excuse. While all courts should be sympathetic to the difficulties the COVID-19 pandemic inflicted on the community as a whole including the legal community, "Plaintiff's invocation of the pandemic standing alone is unavailing" here because it has not "shown specifically how the pandemic has impeded its efforts to

rely on federal law but nonetheless allow unbridled discretion to trial courts in Alabama without any requirement of giving a reasoned basis to exercise discretion in this situation, it would result in the very outcome the federal judiciary has sought to avoid – – allowing such open-ended discretion that there would be no meaning to the timing requirements of the Rule, which would in turn "make a mockery" of those time requirements.

CONCLUSION

These Defendants therefore, first and foremost, respectfully urge this Court to reverse the trial court and hold that a failure to comply with Rule 4(b) is not properly excused when there is no showing of "good cause," no request to extend the time for service, and an undisputable failure on the part of the Plaintiff to follow through on the responsibility to perfect service in a timely manner or demonstrate why more time was needed and show good cause for such an extreme delay of over 300 days. Even under analogous provisions of FRCP 4(m), with or without good cause shown, the circumstances in the case at hand do not warrant or justify the trial court exercising discretion to extend the time to effect

---

serve Defendants." *Johnson v. Bell*, 2020 WL 357858 at *2 (M.D. Ga. July 1, 2020).

service. Lastly, as a third alternative, these Defendants request that at a minimum, this Court remand the case to the trial court to reconsider the issue with instructions that any subsequent denial of the Defendants' Motion to Dismiss could only be entered with adequate justification that would warrant an exercise of discretion to extend the time to effect service under the circumstances presented here with further instructions that the expiration of the statute of limitations on certain claims cannot, standing alone, justify excusing all other requirements under Rule 4(b).

Respectfully submitted,

s/ Sybil V. Newton
Michael K. Wright (WRI005)
Sybil V. Newton (ABB001)
George E. Newton, II (NEW049)
STARNES DAVIS FLORIE LLP
100 Brookwood Place – 7th Floor
Birmingham, AL 35209
Phone: (205) 868-6041
mwright@starneslaw.com
snewton@starneslaw.com
gnewton@starneslaw.com

Attorneys for Appellants/Defendants, Stanley Lochridge, M.D. and Cardio-Thoracic Surgeons, P.C.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28(j)(1) because, excluding the parts of the document exempted by Ala. R. App. P. 32(c) and 28(j)(1), it contains 7,934 words as counted by the word count function of Microsoft Word word-processing software.

2. This motion also complies with the typeface requirement of Ala. R. App. P. 32(a)(7) because it has been prepared in a proportionately spaced typeface using the Microsoft Word word-processing software in 14-point Century Schoolbook font.

s/ Sybil V. Newton

Michael K. Wright (WRI005)
Sybil V. Newton (ABB001)
George E. Newton, II (NEW049)
STARNES DAVIS FLORIE LLP
100 Brookwood Place – 7th Floor
Birmingham, AL 35209
Phone: (205) 868-6041
mwright@starneslaw.com
snewton@starneslaw.com
gnewton@starneslaw.com

Attorneys for Appellants/Defendants, Stanley Lochridge, M.D. and Cardio-Thoracic Surgeons, P.C.

CERTIFICATE OF SERVICE

I do hereby certify that on February 14, 2022, I electronically filed the foregoing with the Court and also certify that a copy was served via e-mail to the following counsel of record:

Anthony Piazza, Esq.
P. O. Box 550217
Birmingham, AL 35255
Phone: (205) 617-6211
anthonypiazza0326@hotmail.com

Patrick M. Shegon, Esq.
Stephen P. Dees, Esq.
RUSHTON, STAKELY, JOHNSTON
& GARRETT, P.A.
184 Commerce Street
Montgomery, Alabama 36101
pms@rushtonstakely.com
sdees@rsjg.com

s/ Sybil V. Newton
Michael K. Wright (WRI005)
Sybil V. Newton (ABB001)
George E. Newton, II (NEW049)
STARNES DAVIS FLORIE LLP
100 Brookwood Place – 7th Floor
Birmingham, AL 35209
Phone: (205) 868-6041
mwright@starneslaw.com
snewton@starneslaw.com
gnewton@starneslaw.com

Attorneys for Appellants/Defendants, Stanley Lochridge, M.D. and Cardio-Thoracic Surgeons, P.C.

EXHIBIT "A"

ELECTRONICALLY FILED
8/11/2021 3:16 PM
01-CV-2019-903763.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

TOMBRELLA FRANCES, Plaintiff, V. LOCHRIDGE STANLEY, CARDIO-THORACIC SURGEONS, PC, ST. VINCENT'S BIRMINGHAM, MEHERG WALTER ET AL, Defendants.	))))))))))	Case No.: CV-2019-903763.00

ORDER

This matter comes before the Court on a Motion to Certify Question for Interlocutory Appeal pursuant to ARAP 5 filed by Defendants Stanley Lochridge, MD and Cardio-Thoracic Surgeons, P.C., seeking to certify the following controlling question of law pertaining to the Court's July 21, 2021 Order denying Defendants' Motion to Dismiss:

Question:

Does this Court have jurisdiction over Defendants Stanley Lockridge, MD and Cardio-Thoracic Surgeons, PC, both of whom were not served for ten months after the filing of the Complaint (August 22, 2019 filing/June 22, 2020 service), considering the 120-day service/ showing of good cause requirements of ARCP 4(b) and in light of the undisputed facts that: (1) service on both Defendants was attempted at the outset of the case with no follow up or subsequent attempts at service until June of 2020; (2) there was no requested extension of time to perfect service by Plaintiff's prior or present counsel; (3) current counsel for the Plaintiff appeared

> **on February 8, 2020 but service was not attempted again or perfected until June 22, 2020 – an additional 19 weeks/135 days from current counsel's entry of appearance in the case; and (4) in response to these Defendants' Motion to Dismiss, Plaintiff's current counsel's response to this Court was that the initial attempts at service by prior counsel failed due to unavailability and notice of a "wrong address." (Doc. 168)**

The Court has reviewed the filings by the parties and the law, and for the reasons set forth below, the Court finds that the Motion to Certify is due to be **GRANTED**.

Ala. R. App. P. 5(a) states that a party may request permission to appeal from an interlocutory order in certain circumstances. Specifically, Rule 5(a) states as follows:

> A petition to appeal from an interlocutory order must contain a certification by the trial judge that, in the judge's opinion, the interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion, that an immediate appeal from the order would materially advance the ultimate termination of the litigation, and that the appeal would avoid protracted and expensive litigation. The trial judge must include in the certification a statement of the controlling question of law.

Ala. R. App. P. 5(a). After consideration of the arguments of the parties, the Court agrees that the Defendants' Motion to Dismiss and the July 21, 2021 Order denying that motion involve a controlling question of law regarding whether this Court has jurisdiction over these Defendants. In this Court's opinion, there is a "substantial ground for difference of opinion" regarding this question. An immediate appeal from the July 21, 2021 Order has the potential to "materially advance the ultimate termination of this litigation" and "avoid protracted and expensive litigation," because a ruling by the Alabama Supreme Court in favor of these two Defendants on the issue of in personum jurisdiction would terminate the litigation against them and avoid protracted and

expensive litigation for and against those parties, including the hiring of experts and a lengthy trial, when this Court potentially lacks jurisdiction over them and, if so, any judgment against them would be void.

Accordingly, the Court hereby **GRANTS** Defendants' Motion to Certify Question for Interlocutory Appeal under Ala. R. App. P. 5(a) and **CERTIFIES** that its July 21, 2021 Order involves a controlling question of law as to which there is substantial ground for difference of opinion; that an immediate appeal from this Order would materially advance the ultimate termination of the litigation; and that the appeal would avoid protracted and expensive litigation. This Order is being entered on or before August 18, 2021 and therefore within the 28-day time frame provided for in ARAP 5.

In accordance with Ala. R. App. P. 5(a), the Court further CERTIFIES the following statement of the controlling question of law:

> **Does this Court have jurisdiction over Defendants Stanley Lockridge, MD and Cardio-Thoracic Surgeons, PC, both of whom were not served for ten months after the filing of the Complaint (August 22, 2019 filing/June 22, 2020 service), considering the 120-day service/ showing of good cause requirements of ARCP 4(b) and in light of the undisputed facts that: (1) service on both Defendants was attempted at the outset of the case with no follow up or subsequent attempts at service until June of 2020; (2) there was no requested extension of time to perfect service by Plaintiff's prior or present counsel; (3) current counsel for the Plaintiff appeared on February 8, 2020 but service was not attempted again or perfected until June 22, 2020 – an additional 19 weeks/135 days from current counsel's entry of appearance in the case; and (4) in response to these Defendants' Motion to Dismiss, Plaintiff's current counsel's response to this Court was that the initial attempts at service by prior counsel failed due to unavailability and notice of a "wrong address." (Doc. 168).**

DONE this 11th day of August, 2021.

/s/ CAROLE C. SMITHERMAN
CIRCUIT JUDGE